STATE OF MICHIGAN

COURT OF APPEALS

In re Application of CONSUMERS ENERGY COMPANY for Approval of Refunds.	UNPUBLISHED April 24, 2014
MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION, Appellant, v	No. 315471 MPSC
MICHIGAN PUBLIC SERVICE COMMISSION, Appellee, and CONSUMERS ENERGY COMPANY, Petitioner-Appellee.	LC Nos. 00-016861 and 00-016191

Before: WILDER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

The Michigan Public Service Commission (PSC) issued an order extinguishing a trust obligation it had previously imposed on Consumers Energy Company (Consumers) relative to a liability owing to the United States Department of Energy (DOE). The PSC also approved of Consumers' proposed distribution of $120 million of proceeds from the settlement of a lawsuit by Consumers against the DOE. The proposed distribution included a $23.3 million refund to ratepayers. Intervenor Michigan Community Action Agency Association (MCAAA) appeals as of right, challenging the extinguishment of the trust requirement and arguing that the distribution to ratepayers was insufficient. We affirm.

I. RELEVANT FACTS

Consumers owned and operated the Big Rock Point Nuclear Generating Plant, which was retired in 1997, and the Palisades Nuclear Generating Plant, which was sold in 2007. In 1983, Congress passed the Nuclear Waste Policy Act (NWPA), 42 USC 10101 *et seq.*, which gave the

DOE responsibility for collecting high-level radioactive waste and spent nuclear fuel (SNF) but provided that the generators of the waste would pay for disposal. See 42 USC 10131(a)(4). Consumers entered into a "Standard Contract"[1] with the DOE pursuant to the NWPA. The DOE imposed a one-time fee for SNF generated before April 7, 1983 (the DOE liability), and ongoing fees for SNF disposal costs that commenced after 1983. Utilities had the option of paying the DOE liability immediately or at any time prior to the first delivery of SNF to the DOE. Consumers elected to pay at the time the federal government disposed of the nuclear waste.

Under the Standard Contract, the DOE was to begin accepting, transporting, and disposing of SNF on January 31, 1998. The DOE did not and has not done so.

On April 11, 2007, the Palisades facility, including two independent spent fuel storage installations (ISFSI I and ISFSI II), that house SNF and will do so until transferred off-site, together with an ISFSI at Big Rock, were sold to Entergy Nuclear Palisades, LLC (Entergy) in an asset sale agreement. Entergy paid Consumers $380 million for Palisades and Consumers paid Entergy $30 million to take title to the Big Rock ISFSI. Entergy took responsibility for the SNF and was assigned Consumers' rights under the Standard Contract. However, Consumers retained responsibility for the DOE liability and retained its right to pursue its damages claims against the DOE for pre-closing damages arising from the delay in performing under the Standard Contract.

Consumers had previously sued the DOE for *partial* breach of the standard contract based on delayed acceptance of the SNF. *Consumers Energy Co v United States,* Court of Federal Claims No. 02-1894. It sought over $150 million in damages. Consumers' attorney, Jeffrey S. Theuer, explained that the claim for partial breach included "the costs of constructing and maintaining the Independent Spent Fuel Storage Installations ("ISFSIs") at these sites, the cost of fabricating and loading dry fuel storage casks, and related expenses, as well as the $30 million payment to Entergy."

After the sale to Entergy and while the federal lawsuit against the DOE was pending, the PSC ordered Consumers to place the DOE liability funds into an external trust. It noted uncertainty surrounding future payment of the funds and the fact that the liability had grown quite large. In Case No. U-16191, Consumers provided a proposal for establishing a trust but asserted that "it was the most expensive and risky approach from a customer standpoint" and that the preferable alternative would be to pay the DOE liability outright and extinguish the obligation. However, the PSC determined that this would be imprudent and reiterated that an external trust would be required.

Consumers petitioned for rehearing given a pending potential settlement with the DOE; it quoted a ruling in the federal case that would have allowed the DOE to recoup the DOE liability following a damages judgment in favor of Consumers.[2] Consumers recited that the proposed

[1] The Standard Contract is set forth at 10 CFR 961.11.

[2] This ruling was reversed by the presiding judge but Theuer testified that the federal government would have raised the matter on appeal if the case did not settle.

settlement included payment of the $163 million DOE liability and an award of damages of $120 million. The PSC held on rehearing that the order requiring an external trust did not preclude a settlement of the lawsuit against the DOE. Further, it held that if the case settled, Consumers could petition for relief from the obligation to fund all or part of the trust and should file an application to address disposition of the proceeds.

Ultimately, the lawsuit for partial breach settled. Consumers agreed to accept $120 million for all of Consumers' claims through April 11, 2007. This figure expressly included the $30 million paid to Entergy to take title to the Big Rock ISFSI but there was no breakdown of the remainder of the award. Also, Consumers agreed to extinguish the pre-1983 DOE liability of $163,102,173.

Following the settlement, Consumers filed the application in Case No. U-16861 for review of the settlement and approval of the $23.3 million refund to ratepayers. Moreover, in Case No. U-16191, it filed a petition requesting rescission of the external trust requirement. Consumers proposed that the $120 million settlement be divided as follows:

<u>Recovered Costs Previously Included in Customer Rates</u>			
Securitization - Palisades		$10.4 million	
Enhanced Security Costs	Big Rock	$1.5 million	
	Palisades	$0.2 million	
Stranded Cost - Palisades		$0.2 million	
10d(4) Regulatory Asset - Palisades		$0.7 million	
Post-securitization Costs in General Rates - Palisades		$3.6 million	
Decommissioning - Big Rock		$3.2 million	
Legal Costs in General Rates		$3.5 million	
Total Refunds to Customers			$ 23.3 million

Recovered Costs Not Included in Customer Rates		
Big Rock ISFSI	$ 54.6 million	
Payment to Entergy	$30.0 million	
Litigation and Miscellaneous	$12.1 million	
Total Recovered by Consumers Energy		$ 96.7 million

Michael A. Torrey, the executive director of rates at Consumers, testified that there were several instances where some Palisades and Big Rock ISFSI costs were included in rates and that the total was $23.3 million. Kirk D. Megginson, a financial specialist employed by the PSC, testified that, based on his review of Consumers' proposal, "ratepayers were made whole with regards to ratepayer-provided funds relating to DOE matters." Torrey had also represented that Consumers was "proposing to return 100% of all funds that were collected from customers that were part of the DOE claim" in the refund, and that the $23 million included the small amount of legal costs for the DOE litigation that Consumers had recovered in rates, adding that "customers have not paid for the litigation costs (legal fees or other expenses), and we are not asking them to pay."

The PSC concluded that the settlement was reasonable and prudent. It noted that Consumers recovered four-fifths of its total claim for damages and would have risked recovering less, and that it did not compromise a claim for total breach should the federal courts conclude that such a claim could be litigated. The PSC further concluded that $23.3 million would fully compensate ratepayers for amounts ratepayers paid towards claims covered in the litigation. Finally, the PSC extinguished the trust obligation, finding that payment of the pre-1983 liability as part of the settlement was reasonable and prudent.

II. STANDARD OF REVIEW

In *In re Application of Consumers Energy Company for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574 (2010) (some citations omitted), the applicable standard of review was set forth as follows:

> The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. A reviewing court gives due deference to the PSC's administrative expertise, and should not substitute its judgment for that of the PSC.
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> A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963,

art 6, § 28. Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo.

A PSC order will be deemed unreasonable if it is unsupported by evidence, *Attorney General v Public Serv Comm*, 206 Mich App 290, 294; 520 NW2d 636 (1994). The PSC's findings of fact are given deference since it is in the best position to evaluate the weight and credibility of evidence. *In re Complaint of Rovas*, 482 Mich 90, 101; 754 NW2d 259 (2008).

III. DOE LIABILITY

MCAAA takes issue with the order approving the refund and extinguishing the trust requirement because it objects to the PSC's determination that the decision to pay the DOE liability as part of the settlement was reasonable and prudent. Appellant seems to be arguing that the PSC should not have recognized this tenet of the settlement, and to remedy the imprudence should have continued to require that a trust be funded for the DOE liability.

MCAAA suggests that payment of the DOE liability was imprudent given indications that the DOE may never dispose of the SNF. In this regard, Ronald C. Callen testified on behalf of MCAAA that in 2009 to 2010 the federal government had discontinued pursuit of Yucca Mountain as a repository for nuclear waste and had closed down the repository program. MCAAA argues that the federal government has in essence repudiated the Standard Contract. However, Theuer maintained that, despite abandonment of the Yucca Mountain site, the federal government was still looking for a permanent location and still had an obligation to provide a permanent repository. He acknowledged that the Office of Civilian Waste Management had been eliminated but claimed it was reorganized into other areas of the DOE. He also acknowledged that, pending a permanent solution, SNF might be required to be stored on site for 100 to 300 years. Finally, he acknowledged that Consumers was aware of these problems at the time of the settlement. However, Theuer explained that the only way to eliminate the DOE liability would be sue the DOE for total breach. Theuer noted that two cases had held that there would have to be an amendment to the NWPA that would take exclusive responsibility for SNF disposal from the federal government before a claim for total breach could be pursued. Specifically, in *Indiana Mich Power Co v United States*, 422 F 3d 1369, 1374 (US App, 2005), the Court held:

> Indiana Michigan could not have claimed anticipatory repudiation even if it wanted to; while the government did indicate that it would not meet the 1998 deadline, its actions did not portend an absolute refusal to perform the contract. The NWPA itself, and the Standard Contract's terms drafted pursuant to it, compelled Indiana Michigan to bring an action for partial, not total, breach. Had Indiana Michigan brought an action for total breach, DOE would have been discharged from further responsibility under the contract, a situation apparently not desired by appellant and foreclosed by statute. The NWPA directed that DOE and all nuclear utilities enter into Standard Contracts, 42 USC 10222(a)(1), and concomitantly conditioned the issuance and renewal of Nuclear Regulatory Commission operating licenses upon the execution of those contracts, [42 USC] 10222(b)(1)(A). Additionally, the NWPA provided that DOE was exclusively responsible for SNF collection and disposal in the United States, thereby

> prohibiting Indiana Michigan or any other nuclear utility from seeking alternative disposal means. See 42 USC 10131(a)(4), (b)(2); . . . . Therefore, Indiana Michigan had no choice but to hold the government to the terms of the Standard Contract while suing for partial breach.

In Yankee Atomic Electric Co v United States, 536 F 3d 1268, 1280 (US App, 2008), the Court cited *Indiana Michigan* for the proposition that "the NWPA and the terms of the Standard Contract foreclose any claim for total breach." Moreover, in *Yankee Atomic Power Co v United States*, 94 Fed Cl 678, 728 n 60 (2010), rev'd in part on other grounds 679 F 3d 1354 (Fed Cir, 2012), the Court concluded that a claim for total breach could not go forward despite the Yucca Mountain and related developments:

> DOE has partially breached; it has not repudiated. The government's consistent position in this case has been that DOE will perform; accordingly there are continuing obligations under the Standard Contract. To what extent recent actions by the government portend a cardinal change or total breach such that future cask loading to DOE will not occur, or will occur so far in the future as to make incurrence of those obligations not a meaningful comparison to the costs that would have occurred in the non-breach world some decades earlier, is not now presented. [*Southern Cal Edison Co v United States*, 93 Fed Cl 337, 342, 367-368 (2010), aff'd 655 F 3d 1319 (Fed Cir, 2011)] (citing Presidential elimination of funding for Yucca Mountain and DOE's motion before the NRC to withdraw license application and related litigation, concluding that "[n]onetheless, we continue to operate under the legal fiction that there has only been a partial breach, and that the government will be able to perform sometime after 2020;" until there is government performance, there are no avoided costs)[.]

Although there has been no repudiation of the Standard Contract or amendment to the NWPA that would allow for a claim for total breach, there is a logical appeal to MCAAA's argument that the liability would not come due for the indefinite future and may never come due given the abandonment of Yucca Mountain as a proposed site, and that it was therefore not prudent to pay. However, the PSC's determination that Consumers acted reasonably and prudently in paying the DOE liability as part of the settlement was not unlawful or unreasonable. Consumers' case for partial breach was scheduled to go to trial. Theuer noted that the settlement was more favorable than awards and settlements in other SNF cases and reduced the risk of a lesser award that would have been insufficient to eliminate the $54.6 million ISFSI cost and $30 million Entergy payment, which could have become a future customer liability. Also, Theuer believed the damages award was higher as a result of the DOE liability being extinguished. Theuer observed that, by settling, Consumers and ratepayers avoided the risk of appeal of an adverse judgment and attendant delay. Torrey added that paying the DOE liability or putting it in a trust would have had the same ratemaking and financial impact on ratepayers, and that extinguishing the DOE liability eliminated "a major liability from Consumers Energy's balance sheet, and eliminate[d] an issue that had spawned various controversies in recent rate proceedings." Moreover, Torrey noted that the settlement provided "certainty that the funds collected by Consumers Energy from customers to pay the DOE Liability were used for that purpose, thereby avoiding any risk that the Company would be unable to make that payment in the future," and avoided "the potential risk that, if the U-16191 trust had been established, the

value of trust assets will decline and be insufficient to cover the future amount of the DOE Liability." Further, Theuer opined that proceeding to trial would likely have foreclosed the recovery of the $30 million based on a subsequent September 2011 federal circuit court opinion.[3] He noted that the presiding judge had ruled that the federal government would not be entitled to offset any damages award with the DOE liability. However, he testified that the DOE would have raised the matter on appeal. In other words, the DOE was taking the position that if Consumers prevailed, any payment to Consumers would have to be offset by the DOE liability. MCAAA asserts that the $120 million in damages could have been attained by proceeding with a two-week hearing without paying the $163 million DOE liability. However, it appears that there was a risk that Consumers would go to trial, prevail against the DOE for partial breach for less than the settlement amount of $120 million, and end up having to pay the federal government the $163 million DOE liability in any event. Thus, the possibility that the DOE liability would never ripen into an actual obligation does not render the payment of the liability as part of the settlement unreasonable or imprudent, and the PSC's determination to this effect was not unlawful or unreasonable.

MCAAA suggests that the decision approving the settlement and extinguishing the trust obligation was a reversal of precedent since the PSC had determined at the time it was requiring the external trust that paying the $163 million would be imprudent and reward the DOE for breach. MCAAA maintains that failing to explain the reversal renders the PSC's order unlawful. However, Consumers' previous proposal for payment of the DOE liability outright was not connected with any settlement. This change in circumstance and the benefits of the settlement provided sound reasons for the PSC's departure from its prior determination. Accordingly, even if precedent were a consideration, the departure did not render the PSC's order approving of the disbursement of settlement funds and extinguishing the obligation to create a trust for the DOE liability unreasonable or unlawful.

IV. PALISADES ISFSI

MCAAA next argues that the refund to ratepayers was insufficient because it did not account for the costs of the Palisades ISFSIs. As noted above, the Palisades ISFSIs were sold to Entergy together with the rest of the Palisades facility and the Big Rock ISFSI. In Case No. U-14992, the PSC addressed, among other things, how the proceeds from that sale would be allocated between Consumers and ratepayers. William A. Peloquin testified on behalf of MCAAA that Consumers retained $305.7 million from the sale of Palisades, which constituted the book value of Palisades' assets, and refunded the remaining $67.5 million to ratepayers. Moreover, he said that Consumers' records established that Consumers invested $39.3 million in

[3] Theuer is apparently referring to *Boston Edison v United States*, 658 F 3d 1361, 1366 (Fed Cir, 2011), which was issued on September 28, 2011, and held that a utility could not recover costs it had paid a buyer for future decommissioning in a partial breach case since this would be an element of a total breach claim.

the Palisades ISFSIs between 2001 and the sale in 2007,[4] which were offset by $6.6 million of accumulated depreciation, leaving $33.7 million. Further, he claimed that the $305.7 million retained after the sale of Palisades included the $33.7 million, and claimed that Consumers' claim in the DOE litigation included the Palisades ISFSI investment. He opined that the refund due to ratepayers from the DOE litigation settlement was therefore understated by $33.7 million.

As noted above, Torrey and Megginson indicated that ratepayers were made whole with regards to ISFSI expenses and "100% of all funds that were collected from customers that were part of the DOE claim" were refunded. The PSC was not persuaded that additional costs relative to the Palisades ISFSIs should be included in the distribution to ratepayers since there was no showing that ratepayers paid any additional amounts. Moreover, it stated that wording in Consumers' proposed distribution of excess sale proceeds in Case No. U-14992 did not establish that ratepayers paid for this asset. Further, the PSC stated:

> The Commission acknowledged in these orders that Consumers had pending claims against the DOE related to certain amounts spent on SNF storage and fees, and chose to defer any decision awarding either Consumers or ratepayers recovery of those amounts. That deferral was not meant to telegraph that the Commission intended to direct to ratepayers amounts that ratepayers had not paid. Further, the Commission finds that the double-recovery argument fails. If Consumers had chosen to bargain away a claim that happened to have been 100% ratepayer funded (and only that claim), the Commission would be concerned. However, no party showed (or even argued) that the Palisades ISFSI II costs were 100% ratepayer funded, and no evidence was introduced showing that ratepayers paid any costs associated with Palisades ISFSI II beyond those already included in the proposed distribution. With this order, Consumers will refund to ratepayers the full portion of Palisades ISFSI II cost that is attributable to ratepayers.

Since ratepayers were compensated with a refund that reflected all rates that had been recovered from ratepayers for the Palisades ISFSIs, the PSC's conclusion that ratepayers were not entitled to a refund that reflected additional costs was not unreasonable or unlawful.

III. MISCELLANEOUS COSTS

Finally, MCAAA argues that bank letter of credit charges should have been refunded to ratepayers and that the federal litigation costs should have been shared between ratepayers and shareholders. However, MCAAA does not claim that ratepayers paid for the bank letter of credit charges.[5] While some of the legal fees associated with the DOE litigation were covered by rates,

[4] The record indicates that of the $39.3 million, only about $366,000 was spent on the Palisades I ISFSI during this time. MCAAA and the PSC focus on Palisades ISFSI II, apparently for this reason.

[5] MCAAA represents that these costs were associated with the sale of the assets to Entergy, and that Consumers agreed to provide bank letters of credit to guarantee that Consumers would pay the DOE liability if the DOE disposed of the pre-1983 SNF during the year that the bank letter of

Megginson indicated that it was a small amount and that it was included in the $23.3 million refunded to ratepayers. Since it appears that Consumers bore the cost for the bank letter of credit charges and the bulk of the legal fees, and since there is no argument that the litigation was not necessary or that it was unwarranted, the PSC order was not unlawful or unreasonable to the extent it approved a distribution giving these amounts to Consumers.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

credit issued. MCAAA asserts that the bank letters of credit were not requested as part of the claim in the DOE litigation, but they were a cost necessitated as a result of the partial breach, and therefore would have been an appropriate element of the damages award.